to that, as pointed out by Mr. Balasingam and which I agree, can be found in *Perisamy v. PP* [1966] 1 MLJ 138, at p. 139, where it is said that an appeal court "must confine itself strictly to the evidence on the record rather than indulge in surmise". There is absolutely no evidence to show that the visitors' book (showing the accused to be in Beaufort, and not in Kota Kinabalu where the accused was alleged to have given the RM60,000 cheque to Teo) was manufactured. Therefore, there is no substance in this ground of appeal. With that, I have dealt with all the grounds advanced by the learned Deputy who has made an admirable effort to argue this appeal even though the obstacles seem insurmountable. This judgment is made so much easier to make and write because every point was ably argued, and backed up by authorities, by Mr. Balasingam, for which I wish to thank Counsel. I dismiss the appeal of the Public Prosecutor.

As for the accused, he has been freed by the Sessions Court and now the High Court, both of which are constituted by not infallible mortals. But, we are supposedly a nation of God-fearing people which means that the accused, despite having gone through the Courts, will, nevertheless, have to in the future receive the judgment, in his case, of Allah, whether or not he is in fact God-fearing.

PUBLIC PROSECUTOR

v.

LAU SIEW NGUONG & ANOR.

HIGH COURT, SIBU
TUAN HJ. MUHAMMAD KAMIL
BIN AWANG JC
[CRIMINAL APPEAL NO. 41 OF 1991]
11 OCTOBER 1993

CRIMINAL LAW & PROCEDURE: Charge of being concerned in the importation of prohibited goods - Whether charge proved - Prosecution's appeal against acquittal - Magistrate ordering the goods to be confiscated - Respondents appeal against order of forfeiture.

The respondents were charged with being jointly concerned in the importation of prohibited goods, an offence under s. 135(1)(a) of the Customs Act 1967 (the Act). The prosecution claimed that the respondents had attemped to claim two containers of frozen chicken wings. The respondents produced two declaration forms which were not complete as the import permits (the AP) were not attached. The AP were only produced the next day and the prosecution claimed that the respondents had thereby contravened s. 135(1)(a) of the Act.

The respondents contended that they could not obtain the AP on the day the chicken wings arrived as the veterinary officer stationed in Sibu was away on travelling duty and consequently they had to obtain the AP from the Veterinary Department at Kuching which caused a delay of one day.

The learned Magistrate accepted the respondents explanation and held that the respondents did not have the intention to evade the law. The respondents were acquitted and discharged by the learned Magistrate who then went on to order the confiscation of the frozen chicken wings.

The prosecution appealed against the order of acquittal and discharge and the respondents appealed against the order for forfeiture of the chicken wings.

Held:

[1] Insofar as the prosecutions appeal is concerned, the learned Magistrate had not misdirected himself on the facts of the case and he had come to a correct decision.

[2] Forfeiture under s. 127(1) of the Act is mandatory if it is proved to the satisfaction of the Court that an offence against the Act has been committed and that the goods were the subject matter of or were used in the commission of the offence.

[3] In the instant case there is no offence committed against the Act because the chicken wings were covered by the AP issued by the Veterinary Department and that permit had not been withdrawn. Therefore the chicken wings were imported under a valid permit. Furthermore the duties on the chicken wings had been paid before the issue of the permit and as such they were not the subject matter of the offence.

[Order of acquittal confirmed. Order of forfeiture set aside. The chicken wings or the proceeds thereof to be returned to the owner].

Cases referred to:
Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249 ***(refd)***
Public Prosecutor v. Mohd. Omar Lopez @ George Anthony Lopez [1993] 1 CLJ 222 ***(dist)***

Legislation referred to:
Customs Act 1967, ss. 11, 79, 127(1), 135(1)(a), (iii)
Customs (Prohibition of Imports) Order 1988, r. 3

For the appellant - Abdul Rahman bin Sebeli, DPP
For the respondents - Dr. Chew Peng Hui; M/s. Battenberg & Talma

JUDGMENT

Hj. Muhammad Kamil bin Awang JC:
The appellants, the proprietor/manager and clerk respectively of Sing Lieong Trading Company and Top-Most Sdn. Bhd. were charged as follows:

1st Charge:

> That you, Lau Siew Nguong and Lau Hui Ong being then the proprietor and the clerk, respectively of Sing Lieong Trading Company, 5 Lane 1, Lanang Road, Sibu, at about 11.40 a.m. on 2 October 1989 at Rajang Port Authority Wharf, Sibu, were jointly concerned in the importing of prohibited goods to wit, 14,960 kilograms of Frozen Chicken Wings valued at RM29,920 such goods being goods the import of which is prohibited except under and by virtue of a valid import licence issued by the Director General of Customs under the Customs (Prohibition of Import) Order 1988 (P.U.(A) 408) and thereby committed an offence under s. 135(1)(a) and punishable under s. 135(1)(iii) of the Customs Act 1967.

2nd Charge:

> That you, Lau Siew Nguong and Lau Hui Ong, being then the manager and the clerk, respectively of Top-Most Sdn. Bhd. at about 11.40 a.m. on 2 October 1989 at Rajang Port Authority Wharf, Sibu were jointly concerned in the importing of prohibited goods to wit, 14,484 kilograms Frozen Chicken Wings valued at RM28,968 such goods being the goods the import of which is prohibited except under and by virtue of a valid import licence issued by the Director General of Customs under the Customs (Prohibition of Import) Order 1988 (P.U.(A) 408) and thereby committed an offence under s. 135(1)(a) and punishable under s. 135(1)(iii) of the Customs Act 1967.

At the conclusion of the case, both respondents were acquitted and discharged by the Magistrates' Court. The frozen chicken wings, however, were ordered to be confiscated.

Against this decision, both sides appealed; the prosecution against the acquittal and discharge of the respondents on both charges, and the respondents against the order for forfeiture of the chicken wings.

The prosecution story was that on 2 October 1989 the M.V. Cris Lemona arrived at the Rajang Port Authority Wharf, and amongst other things there were two containers of frozen chicken wings. The respondents came to claim the chicken wings and produced two declaration forms which were not complete, as the import permits (the AP) were not attached. The AP were produced only on the next day 3 October 1989. Therefore they had contravened s. 135(1)(a) of the Act.

The defence story was that they could not get the AP on 2 October 1989 as the veterinary officer, the only one stationed in Sibu, was away on travelling duty from 2 to 5 October 1989. It appears that the practice has been that an importer has to produce two types of import documents, viz. the permit on Form C (the AP) from the Veterinary Department which is valid for one shipment only, and a Lesen Impot di bawah s. 11 (Akta Kastam 1967). The AP is a pre-requisite because the particulars of this AP will have to be endorsed under item 21 of the import licence. Without this endorsement it appears that the import licence is not valid.

The AP could only be issued on the day the chicken wings arrived because it was necessary to know the exact weight of the consignment (i.e. chicken wings) for the purpose of the fee to be calculated and paid by the importer. All these will be done after the physical inspection of the goods to ascertain the fitness of the goods e.g. the chicken wings are fit for human consumption. It is prescribed in the Customs (Prohibition of Imports) Order 1988 (hereinafter "the Order 1988"), r. 3 which states:

> The importation into the Federation of all goods specified in columns (2) and (3) of the Second Schedule hereto, originating from the countries shown in column (4) of the said Schedule is prohibited, except under and by virtue of an Import Licence granted by the Director General of Customs or the proper officer of customs appointed by the Director General of Customs to act on his behalf at the Ministry, Department or Statutory Body mentioned in column (5) of the said Schedule, and subject to such conditions as may be specified in such licence.

The second Schedule referred to in r. 3 of the Order 1988, states:

(1)	(2)	(3)	(4)	(5)
Item No.	Description of Goods	Heading/ Subheading No.	Country	Ministry/ Department/ Statutory Body Issuing Licence
2.	Poultry (fowls, chicks, ducks, geese, turkeys, guinea fowls and pigeons) alive or dead or any part thereof		All countries	Veterinary Department

For the purpose of the importation of chicken wings, the import licence (AP) issued by the Veterinary Department is all that is required. It is, however, not clear what is the exact procedure to be followed once the AP is obtained. The practice seems to be that the AP and the lesen impot have to be submitted together for the import of the chicken wings.

From the evidence the AP was dated 3 October 1989. The respondents obtained the AP on 3 October 1989 from the Veterinary Department at Kuching. The respondents had been in this business of importing of chicken wings for a long time, more than 10 years, and this was the procedure which had been followed for obtaining customs clearance since. PW19 (Dr. Humrawali Khan) confirmed that he was attached to the Veterinary Department, Sibu at the material time and he was the only veterinary officer. On 2 October 1989 to 5 October 1989 he was on travelling duty i.e. he was not in Sibu. In the cross-examination he stated that if he had been in Sibu on 2 October 1989 there would be no problem; he would issue the AP. He explained that a person who applies for a AP must give the exact weight for the purpose of the fee which was calculated based on weight.

Q.: In your dealing with the accuseds are they *bona fide* businessmen?
A.: Yes. No hanky panky.

Q.: If you are not in Sibu, how could someone get the AP?
A.: Wait for me to come back or get it from other veterinary officer in other division.

That was exactly what the respondents did. They did not wait for PW19, they went to Kuching and obtained the AP from the Veterinary Department, Kuching. Hence they were one day late.

The learned Magistrate believed the story of the defence, he said:

> The facts of the case also show that the accused had applied permit/licence on 2 October 1989 in Sibu but as the veterinary officer (PW19) was away from Sibu on travelling from 2 October 1989 to 5 October 1989 therefore there was no one in Sibu to sign the permit/licence. The accused managed to get the permit/licence issued in Kuching on 3 October 1989.
>
> The issue that I have to decide from the totality of the evidence before me is whether the accused had the guilty mind to evade the provision of the law.
>
> From the totality of the evidence before me I am satisfied and of the considered opinion that both the accused persons do not have the guilty mind to evade the provision of the law.

I do not hesitate to support the Magistrate's finding. He had not misdirected himself on the facts of the case and had come to a correct decision.

Now I come to the cross-appeal of the respondents against the order of forfeiture of the chicken wings.

Section 127(1) of the Act provides:

> An order for the forfeiture or for the release of anything liable to forfeiture under this

> Act shall be made by the Court before which the prosecution with regard thereto has been held, and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the Court that an offence against this Act or any regulation made thereunder has been committed and that the goods were the subject matter of or were used in the commission of the offence not withstanding that no person may have been convicted of such offence.

It is mandatory that the Court orders forfeiture notwithstanding that there is no conviction. In *Keng Soon Finance Berhad v. Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249, Abdul Hamid F.J. (as he then was) delivering the Federal Court judgment, at page 251 said:

> The fundamental question that calls for determination is whether there is proof to the satisfaction of the Court that an offence against the Ordinance (similarly the Act) has been committed and whether the goods are the subject-matter of the offence ...

It is clear that forfeiture under s. 127(1) of the Act is mandatory if two conditions are proved to the satisfaction of the Court:

(i) the offence against the Act has been committed; and
(ii) that the goods were the subject matter of or were used in the commission of the offence.

In the instant case there is no offence committed against the Act because the chicken wings were covered by the AP issued by the Veterinary Department on 3 October 1989, and that permit had not been withdrawn. Therefore they were imported under a valid permit. The case of *Public Prosecutor v. Mohd. Omar Lopez @ George Anthony Lopez* [1993] 1 CLJ 222 is distinguished in that the licence for the importation of one unit of Nissan Safari Jeep and four units of Toyota Hi-Ace Van was revoked by the customs. The duties on chicken wings had been paid before the issue of the permit and as such, they were not the subject matter of the offence. Section 79 of the Act permits the importer at least two months within which to declare the goods imported and it would certainly give him enough time for the obtaining of the permit from the Veterinary Department. In this case it was explained that the container had to be returned to the owner almost immediately, therefore the respondents had to take out the chicken wings.

In the circumstances of the case, the order of acquittal is confirmed, the order of forfeiture is set aside, and I order that the chicken wings or the proceeds thereof be returned to the owner.